United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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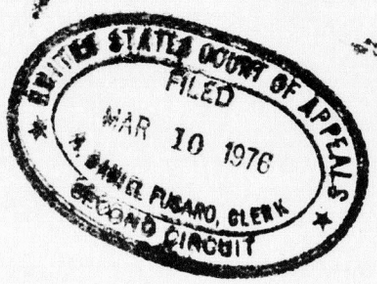

LUCIO P. SALVUCCI
Plaintiff, Appellant

v.

THE NEW YORK RACING ASSN., INC., ET AL.
Defendants, Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT

COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

Submitted by,

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ISSUES PRESENTED FOR REVIEW

I. Whether there was a genuine issue of a material fact to be litigated in the Court below.

II. Whether the complaint states a claim upon which relief can be granted.

STATEMENT OF THE CASE

The action below was brought under the Copyright Act, 17 U. S. C. Sec. 101, in the United States District Court for the Eastern District of New York.

The plaintiff-appellant, Lucio P. Salvucci, (hereinafter "Salvucci") is domiciliary of Massachusetts and the holder of the copyrights.

The named defendants-appellees (hereinafter "racing establishments") are corporations organized under the laws of New York and doing business in that state.

Salvucci's claim is based on the facts that he created original expressions explaining a new wagering offer to sell on the finish positions of horse and dog races which copyright was duly recorded on April 2, 1962, and that he received a certificate from the Registrar of Copyright establishing a Prima Facie case of a valid copyright. These copyrighted publications entitled TRI-3 and TRI-3 DOUBLE are collected as attachments to the complaint. (App. 10-15). Salvucci claims that these original and creative copyrighted works were infringed on by the racing establishments (App. 4-7). Also infringing on his exclusive rights to print, reprint, copy, vend, publish and make other versions such as abridgements.

New York Racing Association, Inc. and Roosevelt Raceway, Inc. filed motions for Summary Judgment and Dismissal for failure to state a claim upon which relief could be granted. On December 2, 1975, Mishler J., of the court below, granted the motions of the racing establishments and dismissed the complaint. (App. 137). Salvucci now appeals from that order.

The court erred in that by addressing itself to what the racing establishments did not do, it dismissed infringement claim when it should have addressed itself to a letter of access (App. 127) and similarities of Exhibit A (App. 12 and 15) and parallel similarities from which inference of copying can be alleged. To say the same thing in different words without permission is paraphrasing, which is present in this case.

ARGUMENT

I. The court below erred in granting the motion for a summary judgment in favor of the racing establishments. It is not the purpose of a summary judgment to deprieve litigants of their right to a full hearing on the merits if any real issue of fact is tendered. Sartor v. Arkansas National Gas Corp., 321 U. S. 620, 627 (1944). It is respectfully submitted that whether the racing establishments infringed on Salvucci's copyrighted expressions, so as to have copied those expressions in a substantially similar manner, is a genuine issue of a material fact warranting a trial on the merits.

Before rendering a summary judgment the court below must be satisfied not only that there is no issue as to any material fact, but also that the moving party is entitled to a judgment as a matter of law. Palmer v. Chamberlin, 191 F. 2d 532 (5th Cir. 1951). Salvucci has based his claim squarely on the statutory copyright law, and has properly pleaded an infringment action against the racing establishments, thereby making a motion for summary judgment inappropriate at the pretrial stage.

II. UNDER THE JUDICIAL STANDARD THAT ALLEGATIONS OF A COMPLAINT SHOULD BE CONSTRUED MOST FAVORABLY TO THE PLEADER, SALVUCCI'S COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Pleadings under the Federal Rules are to be liberally construed, 2A Moore's Federal Practice, Par. 12.08 (2d ed. 1948). Salvucci's complaint should not be dismissed under FRCP 12 (b) (6) since it was not shown to be a certainty that he was entitled to no relief under any state of facts which could be proved in support of his claim. Ballou v. General Electric Co., 393 F. 2d 398, 399 (1st Cir. 1968).

The complaint alleges that Salvucci is the present owner of the copyrights on certain creative expressions with an objective to be reached by pari-mutuel wagering on horses and dogs, (App. 3), with the selling of tickets by the racing establishments, that registration was in compliance with the applicable statute, and that the racing establishments infringed on the copyrights; these averments should be fully sufficient to withstand the challenge of a FRCP 12 (b) (6) motion (see Tralins v. Kaiser Aluminum & Chemical Corp., 160 F. Supp. 511, 512 (D. Md. 1958).

Salvucci argued below that his copyrighted works constituted distinguishable variations by adding a new dimension from previously existing expressions of methods and systems of wagering.

After registration Salvucci visited representatives of many tracks and showed and explained his copyrighted materials. He was informed that the tracks were not interested at that time. (App. 131). Sometime thereafter, the Complaint alleges that by having access of his works the racing establishments infringed upon his copyrights.

In a recent case, the Supreme Court stated the applicable standard to be used by a trial court in passing on a FRCP 12 (b) (6) motion:

> ...It is well established that, in passing on a motion to dismiss...for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 1686 (1974).

It is submitted that if the facts alleged in Salvucci's complaint were indeed construed favorably, then the court below would not have allowed the motions of the racing establishments.

III. Salvucci has stated a valid claim on the basis that he has pleaded and it is in fact the case that his writings were copyrighted and copyrightable and which have been substantially infringed upon by the racing establishments.

Judge Mishler's order represents that - "it is the manner of expressing and not the idea itself which is copyrightable" and that "the limited copyright of (Salvucci's)...expression of the methods of betting was not infringed" (App.139). Salvucci has no quarrel with the fundamental tenet of copyright law that an idea is not subject to copyright protection. The line to be drawn between "expression" and "idea", however, can be at times a difficult judicial enterprise. As was stated by Judge Learned Hand:

> ...no principle can be stated as to when an imitator has gone beyond the "idea" and has borrowed its "expression". Decisions must therefore be ad hoc. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F. 2d 487, 489 (2d Cir. 1960).

If the court, by addressing itself to what the racing establishments did do, i. e. by having copies of Salvucci's several copyrighted literary works, the racing establishments, by having access of the writings and by parallelism of similarities, dismissal because of non-infringment would not have taken place.

It is respectfully submitted that Salvucci's works, with reference to whether they are copyrightable matter, entail more than just a system, method or idea. Salvucci's registered works of original and independently created expressions of a new wager offering to be sold by the racing establishments are well within the scope of protection afforded by the copyright law. There is no question that "...a copyright gives protection to an expression of an idea..." Universal Athletic Sales Co. v. Salkeld, 340 F. Supp. 899, 901 (W.D. Pa. 1972).

In order to prevail on the merits Salvucci will need to prove that the infringement by the racing establishments was only substantially similar to his protected expressions, not exactly identical. Nimmer on Copyright, Section 143.1 (1975). The test is whether the defendants made a substantial and unfair use of Salvucci's work. Nutt v. National Institute, 31 F. 2d 236 (2d Cir. 1929). Salvucci urges that on this theory of law he has, indeed, stated a claim upon which relief can be granted and that is a genuine issue of infringement to be litigated in the court below. (See Annex. pg. 10)

Moreover, in 1972 an Argentine Court ruled that one Juan Pantano who had copyrighted a wagering system was entitled to damages from the Buenos Aires Jockey Club which used his system. Juan Pantano v. Jockey Club of the City of Buenos Aires, published in El Derecho, Case #24.748, CNCiv, Court C, April 18, 1974.

Since the United States and Argentina are signatories of the Buenos Aires Convention of 1910, and since the United States

and Argentina have a Bi-lateral agreement on reciprocity of copyright exchange signed by Presidential Proclamation in 1934 and is still in force, and the United States also being a signatory to the Universal Copyright Convention of 1952 , and endorsed by the United States in 1955, and Argentina in 1958, the same copyright reciprocity is in effect in all three of the above. It can be reasoned that in accordance with Article II of the U.C.C. Convention text, that Juan Pantano's wagering system would be protected here. If the court should recognize a property right of Mr. Pantano, why should not that be authority for recognizing what can be the same property right of Mr. Salvucci.

Salvucci urges, therefore, that his registered expressions are indeed original and that he has independently created a meaningful and substantial variation of wagering on horses and dogs to be used as another offering to sell to the pari-mutuel bettor, and as such his literary copyrighted products are substantially infringed upon by the racing establishments.

Since the beginning of the making of the first snow-balling of knowledge, getting larger with the centuries, Salvucci, by his original copyrighted writings, has indeed contributed to the continuing enlargement of the snow-ball of knowledge. He, and not the racing establishments, contributed.

Salvucci copyrighted his works in question in 1962 and 1963, whereas the alleged copies were used in the early 1970 s .

Salvucci presently is the author of about twenty certificates of copyright individually acquired from 1962 to 1973.

CONCLUSION

Accordingly, it is respectfully submitted for the reasons stated above that the lower court erred in dismissing this action, and that this honorable Court should now overturn the lower court's order and remand for trial on the merits.

Respectfully submitted,

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TRI-3
Copyrighted 1962

TRI-3 is a 3 finish position play or wager on horses or dogs.

The object is to select correctly all finish positions starting with your first chosen finish position of your TRI-3 ticket.

If no one selects correctly all three finish positions, then the person(s) getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner.

TRI-3 DOUBLE
Copyright 1962

TRI-3 DOUBLE is a finish position play or wager consisting of positions 1,2, and 3 in two races on horses or dogs.

The object of this TRI-3 DOUBLE is to select correctly the chosen finish positions in both races of the play or wager.

Winning tickets with the correct first three chosen positions (first half of the TRI-3 DOUBLE) must be exchanged for your selections on the second half of the TRI-3 DOUBLE.

The person(s) getting the most consecutive correct finish positions starting with their first chosen finish position on the first half of the TRI-3 DOUBLE ticket will be the winner.

TRIPLE
Started 1973

The TRIPLE is a form of pari-mutuel wagering. Each bettor selects, in order, the first, second, and third placed horses in the designated TRIPLE race.

If there is a failure to select, in order the first three horses, payoff shall be made on TRIPLE tickets selecting the first two horses, in order; failure to select the first two horses, payoff to TRIPLE tickets selecting the winner to win; failure to select the winner to win shall cause a refund of all TRIPLE tickets.

SIMILARITIES of TRI-3 and first part of TRI-3 DOUBLE

1. A new type wager offering.
2. Object: To select exact 3 positions on one ticket of one race.
3. Absent exact 3 positions winner of exact two positions.
4. Absent exact two positions winner of win position.
5. Played from a single three numbered ticket on one race the first time ever offered.

SIMILARITIES of the TRIPLE

1. A new type wager offering.
2. Object: To select exact 3 positions on one ticket of one race.
3. Absent exact 3 positions winner of exact two positions.
4. Absent exact two positions winner of win position.
5. Played from a single three numbered ticket on one race the first time ever offered.

The TRI-3 and TRI-3 DOUBLE expressions above are the exact wording as they appear in the copyrighted writing.

The TRIPLE expressions above are the exact wording as they appear in the Rules and Regulations of the New York Racing Association. § 4122.41